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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BARCLAYS BANK PLC,
Petitioner,

VS.

FRANCHISE TAX BOARD,
An Agency of the State of California,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE INSTITUTE OF INTERNATIONAL BANKERS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted in support of the Petition for Writ of Certiorari by amicus curiae the Institute of International Bankers. The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

This case involves the application by the State of California of worldwide combined reporting to a U.S. subsidiary of a foreign bank and a U.S. branch of a foreign bank. The decision below

holds that such application does not violate the Foreign Commerce Clause of the United States Constitution.

The Institute of International Bankers is comprised of bankers representing more than 200 banking organizations from over 50 countries. The Institute's members do business in the United States both directly and through subsidiaries, and many do business in California. The Institute is recognized by governmental bodies and industry groups throughout the United States as an important spokesman for international banks. The Institute's purpose is, among other things, to promote a free global financial marketplace. Worldwide combined reporting, because it is inconsistent with the taxing systems used by every nation of the world, creates a barrier to free trade and interferes with the free international flow of goods, technology and capital. Further, worldwide combined reporting, by creating uncertainty and unpredictability, acts as a barrier to the free flow of international financial services.

Accordingly, because worldwide combined reporting interferes with a free global economy, and affects both the members of the Institute and their customers, the Institute has a significant interest in the resolution of the issues in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

A longstanding policy of the United States is to foster and encourage the free flow of goods, technology and capital. A primary object of this policy is the elimination of barriers to free trade among nations.

A free global economy is universally beneficial. It increases aggregate worldwide wealth. The converse is also true. Barriers to trade harm the global economy and cause everyone to suffer. The need for eliminating trade barriers, always important, takes on added urgency at a time, as now, when the United States depends on foreign trade and investment for the health and stability of its economy, and depends on ready access to international financial services to expand its international businesses.

This Court's decisions in *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434 (1979), and *Container Corp. v. Franchise*

Tax Board, 463 U.S. 159 (1983), take into account the imperatives of foreign trade and the role of the United States as one nation among nations. The decision below, however, ignores these concerns, ignores the need for uniformity and the frustration of U.S. economic policy caused by worldwide combined reporting, and even ignores the analysis set forth by this Court in those cases. This Court's failure to review that decision may be regarded as tacit approval of the California Supreme Court's perception of a lessened sensitivity in matters of foreign commerce.

ARGUMENT

The United States has for many years been a net importer of both goods and capital. With its growing trade deficit, the United States has become reliant on foreign capital to finance its high standard of living.[1] United States businesses rely on foreign markets for their goods and services, and depend on ready access to foreign financial services to support their operations overseas.[2] In short, the economy has become globalized, and it is imperative that the United States maintain the free and open international movement of goods, services and capital.

Differing tax systems, like differing regulatory systems, act as barriers to trade, in part because they can lead to uncertainty and unpredictability. To mitigate such uncertainty and unpredictability for United States business abroad as well as for foreign business in the United States, the United States has long advo-

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[1] Statement of the Securities Industry Association to the Committee on Ways and Means, U.S. House of Representatives, July 21, 1992; Statement of Fred T. Goldberg, Jr., Assistant Secretary (Tax Policy), Department of the Treasury, Before the Committee on Ways and Means, U.S. House of Representatives, July 21, 1992.

[2] International banks permit the free flow and translation of the various currencies, as well as reduce costs of international transactions by engaging in interest rate and currency swaps. With the expansion and diversification of our economy, it is important for United States business to be able to obtain readily international financial services, such as overseas drafts, letters of credit, banker's acceptances, etc.

cated the adoption of a uniform standard for the division of income of international businesses, the arm's-length method.

The arm's-length method is now the practice of nations. *Container Corporation v. Franchise Tax Board*, 463 U.S. at 184. The common standard eases tensions between nations because it provides a framework for assigning jurisdiction among nations over profits for taxation, for working out differences, and for mitigating potential double taxation among nations arising from such differences.

This Court has recognized the particular need for uniformity in foreign commerce and has been sensitive to the special concerns and imperatives of international trade and commerce. *Japan Line*, 441 U.S. 434; *Container*, 463 U.S. 159; *Kraft General Foods v. Iowa Dep't of Revenue and Fin.*, ____ U.S. ____, 112 S.Ct. 2365, 2370 (1992). The decision below, on the other hand, is particularly insensitive. The California Supreme Court dismissed as mere "aspirations" more than fifty years of United States effort in promoting the international standard in furtherance of United States foreign economic policy. The court below ignored the international tensions created by the advent of worldwide combined reporting as a method incompatible and competing with the arm's-length standard to divide international income between California, the economic size of a nation-state, and the rest of the world.

Such tensions carry the potential for harm to the nation as a whole. *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875); *Japan Line*, 441 U.S. at 450-51. Because of this risk, which must be weighed by the national government, not a subnational unit, this Court set out clear guidelines for determining when a state tax frustrates essential national uniformity and prevents the Nation from speaking with one voice. *Container*, 463 U.S. at 193-97; *Japan Line*, 441 U.S. at 450, 452-54. This case meets those guidelines. This Court need not speculate on foreign offense, retaliation or threat of retaliation arising from the application of worldwide combined reporting. The record in this case is clear.

The decisions of the lower California courts were consonant with the decisions of this Court in recognizing the need for

heightened scrutiny in matters of national and international concern. Those courts followed this Court's decisions in *Japan Line* and *Container*, and were cognizant of this Court's strong reaffirmations of the importance of uniformity in the international arena in *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1 (1986). The California Supreme Court, however, felt free to disregard dormant commerce clause analysis on the basis that the sequence of the three cases (*Japan Line, Container* and *Wardair*) reflected a lessening of this Court's concerns. The California Supreme Court then posited its own test to determine whether a state tax was removed from commerce clause scrutiny, one which draws "negative implications" from Congressional failure to forbid the tax. The California "negative implications" test thus requires Congress to rein in a state, rather than requiring explicit Congressional approval for a state to burden commerce. This new test has ramifications beyond this Court's *foreign* commerce clause decisions.

The California Supreme Court strayed from the fold and became lost. The decision of that court not only is irreconcilable with this Court's decisions in *Container* and *Japan Line*, because it ignores the dormant commerce clause analysis mandated by those cases, but also directly conflicts with this Court's standard that "Congress must manifest its unambiguous intent" to permit a State action that burdens commerce. *Wyoming v. Oklahoma*, ____ U.S. ____, 112 S.Ct. 789, 802 (1992).

It is imperative that this Court review the decision below now. Failure to do so may be taken as concurrence in the California court's perception of lessened sensitivity, and as tacit approval by "negative implication" of the California court's new constitutional jurisprudence. These fundamental errors in constitutional jurisprudence, now law in California, will multiply while this case remains unreviewed, and other state courts stray down the same misguided path.

CONCLUSION

The United States cannot afford worldwide combined reporting. International trade is more important than ever to the United States. Worldwide combined reporting interferes with the federal government's efforts in furtherance of United States foreign economic policy to secure a uniform standard for division of income for tax purposes among nations. The furtherance of that standard depends on international cooperation and agreement. The decision below, by dismissing the cooperative efforts of nations, led by the United States, as "Executive Branch aspirations," threatens to dismantle over fifty years of effort by our federal government.

This Court said two decades ago:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971). The decision below ignores these words and threatens to bring harm to the nation as a whole.

For the foregoing reasons, the Institute of International Bankers believes that this Court should grant the writ of certiorari in this case.

Respectfully submitted,

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